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Buggy Whip and UNITE HERE! Local 49, UNITE HERE! International Union, AFL-CIO. Case 20-CA-35151

January 21, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on June 30, 2010, the Acting General Counsel issued the complaint on October 29, 2010, against Buggy Whip, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On November 29, 2010, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on December 2, 2010, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer was received by the Regional Office on or before November 12, 2010, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated November 17, 2010, notified the Respondent that unless an answer was received by November 24, 2010, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file an answer, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Sacramento, California (the Respondent's facility), has been engaged in business as a restaurant serving food and beverages to the public. During the 12-month period ending August 31, 2010, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000, and purchased and received at its facility food, beverages, and supplies valued in excess of \$5000 which originated from points located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that UNITE HERE! Local 49, UNITE HERE! International Union, AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Larry LeSieur held the position of the Respondent's president, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All employees performing work covered under the terms of the collective-bargaining agreement between Respondent and the Union, with a term of January 1, 2009, through December 31, 2009.

Since at least 2000, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and, since then, has been recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 1, 2009, through December 31, 2009.

At all material times since at least 2000, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About January 1, 2010, the Respondent terminated monthly contributions on behalf of unit employees to the Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan.

About January 1, 2010, the Respondent terminated monthly contributions on behalf of unit employees to the

Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Plan.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally terminating the monthly contributions on behalf of unit employees to the Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan and the Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Plan, we shall order the Respondent to make whole its unit employees by making all such delinquent plan contributions on behalf of the employees that have not been made since January 1, 2010, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).¹ We shall also order the Respondent to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded

¹ To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Buggy Whip, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with UNITE HERE! Local 49, UNITE HERE! International Union, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the unit by unilaterally terminating monthly contributions on behalf of unit employees to the Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan, and the Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Plan. The unit is:

All employees performing work covered under the terms of the collective-bargaining agreement between Respondent and the Union, with a term of January 1, 2009, through December 31, 2009.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the unit with respect to contributions to the Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan and the Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Plan until agreement or a good-faith impasse is reached, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Make all delinquent monthly contributions on behalf of the unit employees to the Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan and the Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Plan that have not been made since January 1, 2010, including any additional amounts due the funds, in the manner set forth in the remedy section of this decision.

(b) Make unit employees whole for any expenses ensuing from the Respondent's failure to make the monthly plan contributions, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its facility in Sacramento, California, copies of the attached notice marked "Appendix."² Copies of the notice,

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.³ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 21, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

³ Consistent with our recently issued decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010), we have ordered the Respondent to distribute the notice electronically if it is customarily communicating with employees by such means. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9, Member Hayes would not require electronic distribution of the notice.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with UNITE HERE! Local 49, UNITE HERE! International Union, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the unit by unilaterally terminating monthly contributions on behalf of unit employees to the Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan, and the Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Plan. The unit is:

All employees performing work covered under the terms of the collective-bargaining agreement between us and the Union, with a term of January 1, 2009, through December 31, 2009.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the unit with respect to contributions to the Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan and the Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Plan until agreement or a good-faith impasse is reached, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL make all delinquent monthly contributions on behalf of the unit employees to the Sacramento Independent Hotel, Restaurant and Tavern Employees Welfare Plan and the Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Plan that have not been made since January 1, 2010, including any additional amounts due the plans, with interest.

WE WILL make unit employees whole for any expenses ensuing from our failure to make the required monthly plan contributions, with interest.

BUGGY WHIP